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No. 10-90

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED FINANCIAL
SYSTEMS CORPORATION, *et al.*,

Petitioners,

v.

STATE OF INDIANA, EX REL.
INDIANA STATE BAR ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Indiana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where unauthorized practice of law ("UPL") has been defined in Indiana to include the sale of estate plans by non-lawyers and where Petitioners' actions do not implicate fundamental First and Fourteenth Amendment Freedoms.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where pursuant to a Court order requiring all settlement agreements be submitted to the Indiana Supreme Court for approval, the Indiana State Bar Association ("ISBA") made a partial settlement proposal at Petitioners' invitation.

III. Whether Petitioners have presented compelling reasons to grant the Petition, where the Indiana Supreme Court held all Petitioners jointly and severally liable for UPL based on each individual Petitioner's participation and role in UPL.

RULE 29.6 DISCLOSURE STATEMENT

The ISBA is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the membership interests of the ISBA.

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INTRODUCTION

The ISBA petitioned the Indiana Supreme Court to enjoin Petitioners' actions violating Indiana Rule of Admission and Discipline 24 ("Rule 24") (the "Enforcement Action"). The Indiana Supreme Court entered an order enjoining Petitioners' actions and ordering Petitioners to disgorge certain fees (the "Disgorgement Order"). The thrust of Petitioners' request for certiorari is to avoid disgorgement of unlawfully collected fees. The Petition should be denied because Petitioners have not demonstrated a cognizable violation of the United States Constitution so as to warrant review by this Court.

Petitioners now acknowledge that their business practices constituted UPL, but assert that prior to the Enforcement Action they were not on notice that their model of selling and delivering estate planning packages by non-lawyers, without attorney supervision, was UPL. Petitioners contend that because they did not know their actions amounted to UPL at the time, and they were not on notice that they could be ordered to disgorge those fees, it was a due process violation for the Indiana Supreme Court to order disgorgement. This argument fails because Petitioners were advised by outside counsel, and thus were on notice no later than 1999, that the business practices employed in Indiana would constitute UPL.

In addition, Petitioners had been conducting business in Ohio for many years. The Ohio Supreme Court held in 2005 that it was UPL for non-lawyers to

sell estate planning packages and provide legal advice regarding the same and imposed joint and several liability in its disgorgement order. *Cleveland Bar Ass'n v. Sharp Estate Servs., Inc.*, 837 N.E.2d 1183, 1188 (Ohio 2005). Similarly, in 2006, the Indiana Supreme Court issued *State ex rel. Ind. State Bar Ass'n v. Northouse*, 848 N.E.2d 668, 675 (Ind. 2006), citing to the Ohio case, and finding that disgorgement was an appropriate remedy for non-lawyers who sold estate planning documents and provided legal advice regarding the same. Finally, in 2009, two months prior to the hearing in this case, United Financial Systems Corporation ("UFSC") admitted that operating its business model in Ohio, and administering it from its Indiana headquarters, constituted UPL. Petitioners' claim that they did not or could not know that their actions constituted UPL in Indiana and that they had no notice that their unlawful actions could result in disgorgement is simply untenable.

STATEMENT OF THE CASE

Respondent adopts the facts contained in the Disgorgement Order and the Commissioner's Report, both of which are included in the Petition's Appendix. However, the following facts, downplayed or omitted by Petitioners, must be addressed for this Court to properly review the relevant legal arguments.

The facts supporting the finding of UPL in connection with Petitioners' business model and practices are:

1) Non-lawyer salespeople visit customers in their homes and sell estate plan packages on a commission-only basis without attorney supervision (App. 5);

2) The non-lawyer salespeople pushed the most expensive packages of estate documents offered by UFSC, which cost $2,695.00 in 2009, collected full or partial payment on the date of sale, and received commissions ranging from $750.00 to $900.00 (App. 5-6);

3) The non-lawyer salespeople collect personal and financial information from the customer (App. 5-6);

4) The information is routed to Indianapolis, where UFSC assigns each customer to the panel attorney contracted to complete the estate plan package for the customer (App. 6);

5) UFSC pays the panel attorney a fee of $225.00 to complete the estate plan package (*Id.*);

6) The lawyer in most cases has only one phone call with the client and fills in the blanks on forms with the documents, often containing provisions inapplicable to the client or even Indiana law (App. 6-7; 102, ¶ 144; 111, ¶ 176; 123, ¶ 216; 128, ¶ 214; 135, ¶ 237); and

7) UFSC pays another non-lawyer $75.00 to deliver the estate plan documents and assist the customer in executing the documents without any supervision by the panel attorney (App. 9).

Petitioners' statement of facts notes only that Attorney William Hodes advised and testified that their practices did not violate Rule 24. (Petition 3-6). Petitioners omit the evidence supporting the Disgorgement Order that another of UFSC's attorneys earlier advised that the business model employed here would be unlawful. Bruce Kotzan advised Petitioners in 1999 that "[t]here must be contact between the client and the attorney. In the event employees of the company engage in the gathering of information for the preparation of documents, these employees must be acting under the direction of the attorney." (App. 36, ¶ 17). Petitioners ignored this advice, as the business practices at issue in the Enforcement Action did not involve attorneys supervising the non-lawyers who interacted with the customers for whom the attorneys completed legal documents. (App. 5; 81, ¶ 98). Moreover, the "testimony of various panel attorneys reveals minimal independent consultation with clients and heavy reliance on the communications between the client and the company's salesperson." (App. 9).

Additionally, Petitioners fail to mention the fact that UFSC admitted the very practices at issue in the Enforcement Action constitute UPL in Ohio. *Ohio State Bar Ass'n v. United Fin. Sys. Corp.*, 921 N.E.2d 1054 (Ohio 2010) [hereinafter "*Ohio Bar v. UFSC*"]. UFSC agreed that its activities in Ohio involving the sale and delivery of estate plans by non-attorneys and "its activities at its principal place of business in the state of Indiana designed and intended to take effect

in Ohio," amounted to UPL. *Id.* at 1054-55. This admission, which was not disclosed to the ISBA by the Petitioners, came on March 31, 2009, nearly two months before the hearing on the merits in the Enforcement Action. Final Report of the Board on the UPL at 1, 921 N.E.2d 1054 (No. 09-1645), available at http://www.supremecourt.ohio.gov/tempx/651092.pdf.

Finally, the parties to the Enforcement Action participated in settlement discussions. Some individuals admitted violating Rule 24 and, jointly with the ISBA, submitted settlement agreements for approval to the Indiana Supreme Court, which were approved. (App. 55, ¶ 36). Petitioners and the ISBA did not engage in settlement discussions that reached the question of liability, but upon Petitioners' invitation, the ISBA proposed a settlement concept intended to resolve a dispute over the scope of possible disgorgement that could be ordered as a remedy by the Indiana Supreme Court. (Petition 5; App. 62, ¶ 45). While Petitioners quote a portion of the letter sent, they omit the portion that states it was written "on the invitation extended in [Petitioners' counsel's] recent letter to engage in the discussion of concepts for resolving the historical issues in the case." Reply Brief in Support of Motion to Dismiss or, In the Alternative, Motion to Strike, Ex. 1, *State ex rel. Ind. State Bar Ass'n v. United Fin. Sys. Corp.*, 926 N.E.2d 8 (Ind. 2010) (No. 94S00-0810-MS-551) [hereinafter "Settlement Letter"].

REASONS FOR DENYING THE PETITION

The Enforcement Action concerns the regulation of UPL – a matter regulated exclusively by the states. Petitioners' due process rights were not violated by the Disgorgement Order because: 1) Petitioners had due notice under Indiana and federal law that their actions constituted UPL and thus might result in an order of disgorgement; 2) there is no evidence of impermissible prosecutorial bias; and 3) Petitioners each personally participated in UPL and can be held jointly and severally liable for their actions. Accordingly, Petitioners have not demonstrated any "compelling reasons" to grant the Petition. *See* Sup. Ct. R. 10.

I. Those Committing UPL Are Not Entitled to Retain Unlawfully Collected Fees.

The Indiana Supreme Court has no original jurisdiction "except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law. . . ." Ind. Const. Art. 7 § 4. *See also* Ind. Code § 33-24-1-2. This Court has repeatedly held that the regulation of the practice of law is within the province of state courts. *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("That the states have the broad power to regulate the practice of law is, of course, beyond question."); *Brotherhood of Railroad Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964) ("Virginia undoubtedly has broad powers to regulate the practice of law within its borders");

Sperry v. Florida, 373 U.S. 379, 383 (1963) (a state has a "substantial interest in regulating the practice of law within the state").

> The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (U.S. 1978) (internal citations omitted).

In this regard, the Indiana Supreme Court has defined the practice of law as follows:

> The core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney. The undertaking to minister to the legal problems of another creates an attorney-client relationship without regard to whether the services are actually performed by the one so undertaking the responsibility or are delegated or subcontracted to another.

Miller v. Vance, 463 N.E.2d 250, 251 (Ind. 1984) (quoting, *In the Matter of Perrello*, 386 N.E.2d 174, 179 (Ind. 1979)). Moreover, the Indiana Supreme Court has determined that where the filling in of blanks in legal documents prepared by attorneys

"involves considerations of significant legal refinement, or the legal consequences of the act are of great significance to the parties involved, such practice may be restricted to members of the legal profession." *Miller* at 251. (quoting, *State v. Indiana Real Estate Ass'n, Inc.*, 191 N.E.2d 711, 715 (Ind. 1963)). *See also In the Matter of Thrasher*, 661 N.E.2d 546, 549 (Ind. 1996) ("It is essential to the integrity of any legal practice that lawyers maintain independent professional judgment and not fully abdicate the responsibility of providing legal advice, guidance and expertise to nonlawyers."). Indeed, over seventy (70) years ago, the Indiana Supreme Court noted:

> The general meaning of the term, "practice law" or "practice of law," is of common knowledge. . . . [I]t is not confined to performing services in an action or proceeding pending in courts of justice, and, in a larger sense, it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court. *To "practice law" is to carry on the business of an attorney at law*; to do or practice that which an attorney or counselor at law is authorized to do and practice; to exercise the calling or profession of the law, usually for the purpose of gaining a livelihood, or *at least for gain;* to make it one's business to act for, and by the warrant of, others in legal formalities, *negotiations*, or proceedings.

Fink v. Peden, 17 N.E.2d 95, 96-97 (Ind. 1938) (emphasis in original). To argue that the conduct prohibited by Rule 24 is unclear and/or undefined is to ignore nearly a century's worth of Indiana jurisprudence regarding the practice of law.

The ISBA originally requested the disgorgement of fees collected for the sale of estate planning services dating back to 1995, when UFSC was founded and began using the business model addressed in the Enforcement Action. At oral argument before the Indiana Supreme Court, counsel for Petitioners argued that there was no notice that disgorgement of fees could be a remedy for Petitioners' actions occurring prior to 2006, but admitted that *Northouse*, 848 N.E.2d at 675, gave notice that disgorgement could be a remedy. Video of Oral Argument at 32:39, *State ex rel. Ind. State Bar v. United Fins. Sys. Corp.*, 926 N.E.2d 8 (No. 94S00-0810-MS-551), available at http://mycourts.in.gov/arguments/default.aspx?view=detail&id=990, [hereinafter "Oral Argument"]. While the Indiana Supreme Court noted that Petitioners could be required to disgorge fees collected prior to 2006, consistent with Petitioners' arguments, the Court limited the Disgorgement Order to those fees collected after the *Northouse* decision. (App. 22-23). The main thrust of Petitioners' argument is that they were not on notice that disgorgement was a potential remedy for their specific actions.

UFSC obtained legal advice in 1999 that the practices at issue in the Enforcement Action violated Rule 24. (App. 36, ¶ 17). At a minimum, Petitioners

learned in 2006 that non-lawyers may not sell estate plans in Indiana and that the Indiana Supreme Court cited with approval Ohio case law in defining the term "practice of law." *Northouse*, 848 N.E.2d at 672 (citing *Cleveland Bar*, 837 N.E.2d at 1186). The *Cleveland Bar* case held in 2005 that it was UPL to sell estate planning packages like Petitioners were doing in Indiana since 1995. 837 N.E.2d at 1186. Just recently, UFSC admitted the very practices at issue in Indiana amounted to the UPL in Ohio. *Ohio Bar v. UFSC*, 921 N.E.2d 1054. Thus, Petitioners' use of non-lawyers to give legal advice about estate planning and to market and sell estate planning packages without attorney supervision in Indiana, as in Ohio, constituted UPL. (App. 5 & 14). In light of these facts, Petitioners' attempt to attack the Disgorgement Order on the basis of lack of notice defies logic and raises the question of whether any justiciable case or controversy actually exists here.

A. Disgorgement of Fees Collected by Non-Lawyers for Legal Services Is Not a Penalty Subject to Criminal Due Process Standards, but a Restitutionary Measure.

Disgorgement is not recognized as a punishment, but rather is considered restitutionary. *Tull v. United States*, 481 U.S. 412, 424 (1987); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (restitution serves the public interest by restoring the status quo and ordering the return of that which rightfully

belongs to another; it is "within the highest recognized power and within the highest tradition of a court of equity.").

> Restitution [does not] qualify as a criminal punishment. Restitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions. It is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at the others' expense.
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> * * *
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> *Restitution is not "punishment" within the meaning of the* Ex Post Facto *Clause.*

United States v. Newman, 144 F.3d 531, 538-39 (7th Cir. 1998) (internal citations omitted) (emphasis added).

Indiana similarly holds disgorgement is an equitable remedy designed to nullify any unjust enrichment when fees or other property are improperly acquired. *Ind. Fam. and Social Servs. Admin. v. Amhealth*, 790 N.E.2d 162, 169 (Ind. Ct. App. 2003) (Brook, C.J., concurring) ("Restitution is described as a return or restoration of what the defendant has gained in the transaction."). Where the remedy of disgorgement of fees is merited, such is not retributive in nature, but serves to "deter similar conduct in the future." *Northouse*, 848 N.E.2d at 674. Further, "[a]n action to compel a restitution of benefits accrued

need not be founded upon any supposed wrong." *Rollings v. Smith*, 716 N.E.2d 502, 507 (Ind. Ct. App. 1999). Because both federal and Indiana courts consider disgorgement to be restitutionary and not punitive, the same due process considerations that apply in the context of criminal and civil penalties do not apply here.

B. Disgorgement Is a Long-Standing Remedy in Indiana.

Although disgorgement of fees dating back to 1995 was at issue, Petitioners were ordered to disgorge only those fees collected after the issuance of the 2006 *Northouse* opinion (App. 23), which they admitted put them on notice that disgorgement was a potential remedy in cases involving UPL.[1] Oral Argument at 32:39. There was no lack of notice to Petitioners and thus no violation of due process.

Notwithstanding Petitioners' admission that *Northouse* put them on notice that disgorgement is a potential remedy for Rule 24 violations, disgorgement of fees collected for UPL in Indiana is not a recent development. First, the Indiana Supreme Court

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[1] The potential disgorgement amount is around $2.7 million in fees for the sale of estate planning documents. The Disgorgement Order notes that from October, 2006 through May, 2009, UFSC collected more than $29 million, which includes investments sold as a result of gaining access to the individual "clients" through the impermissible sale of estate planning documents. (App. 140-141, ¶¶ 252 & 255).

explained in *Northouse*, "[a]lthough the rule uses the terms 'enjoin' and 'injunction' when referring to the relief available and 'injunctions typically order those to whom they are directed to refrain from doing something, the relief afforded by equity may be extended to compel affirmative action when necessary.'" 848 N.E.2d at 674. *Northouse* provided notice that "[a]n injunction is a formal command of the court, directing the person named therein to refrain from doing certain specified acts . . . or, where the relief is mandatory in form, ***directing such persons to take certain steps to undo the wrong or injury with which they are charged.***" *Id.* (emphasis added). Thus, even before the *Northouse* decision, the Indiana Supreme Court had the authority pursuant to Rule 24 to order the disgorgement of unlawfully collected fees.

Moreover, Indiana courts have long recognized that "a person who was not duly admitted to practice law in this state, in conformity to the provisions of the statute, could not recover for legal services rendered." *See, e.g., Fink,* 17 N.E.2d at 97; *Harris v. Clark*, 81 Ind. App. 494, 496 (Ind. 1924) ("where a statute forbids carrying on a business without first procuring a license, paying a tax, and complying with prescribed tests, inspection, registration or the like contracts made by persons in carrying on such business are void, though the statute contains no express provision to that effect"). Accordingly, it was foreseeable that the Indiana Supreme Court would disgorge fees in the Enforcement Action – it was not a novel or

unprecedented concept and as explained in more detail below, Petitioners had notice that they were violating Rule 24. Thus, the Disgorgement Order does not violate Petitioners' due process rights.

C. Rule 24 Is Not Impermissibly Vague and Petitioners Cannot Claim an Unwitting Violation of Indiana's Prohibition Against the UPL.

1. A Rule 24 enforcement action is not criminal or quasi-criminal, thus the vagueness doctrine is not applicable.

Petitioners' argument that Rule 24 is impermissibly vague fails because Petitioners advocate for a level of specificity required only of criminal or quasi-criminal statutes. For Fourteenth Amendment purposes, courts demand less precision of statutes that impose only civil remedies, in contrast to criminal statutes, because their consequences are less severe.

> The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982).

A Rule 24 enforcement action, by nature, is not quasi-criminal, but is akin to an attorney or judicial disciplinary action. Just as disciplinary actions are intended to protect Indiana's citizens and courts from those who are not fit for membership in the bar, Rule 24 enforcement actions are intended to restrain or enjoin those individuals from the practice of law who are not qualified by virtue of the fact that they are not attorneys. The Indiana Supreme Court has recognized that:

> [D]isbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, *sui generis*, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. *They are not for the purpose of punishment*, but rather seek to determine the fitness of an officer of the court to continue in that capacity and protect the courts and the public from the official ministration of persons unfit to practice.

In the Matter of Roberts, 442 N.E.2d 986, 987 (Ind. 1983) (emphasis added). The Indiana Supreme Court has held that "civil or criminal law definitions are generally not controlling in [disciplinary] actions. . . ." *In the Matter of Gerard*, 634 N.E.2d 51, 53 (Ind. 1994).

Similarly, Rule 24 enforcement actions are not intended "to find fault or assess liability but to protect the public from those not properly licensed or otherwise qualified to act as attorneys." *Northouse*, 848 N.E.2d at 674. If Rule 24 enforcement actions were indeed intended to punish those who practice law without a license, criminal laws regarding UPL in Indiana would be unnecessary. However, the Indiana General Assembly enacted a criminal UPL provision (Ind. Code § 33-43-2-1) and the Indiana Supreme Court enacted Rule 24. Each has its own distinct procedures and remedies. Requiring the same procedures and blurring the lines between the two provisions would render one superfluous.[2]

The Indiana Supreme Court has also noted that its "primary responsibility in admission and discipline matters is to protect the public against incompetent and unscrupulous professionals." *In the Matter of Fletcher*, 655 N.E.2d 58, 60 (Ind. 1995) (holding the Indiana Supreme Court had the power to discipline an individual who was licensed to practice law in Illinois for UPL in Indiana). Individuals who purport to provide legal advice, despite being unlicensed to practice law in Indiana, are within the purview of "incompetent and unscrupulous professionals" referred

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[2] In this regard, the Indiana Supreme Court has expressly stated that a Rule 24 enforcement action "does not preclude, and should not discourage, the State from filing criminal charges in appropriate cases against those who violate the prohibition on the unauthorized practice of law." *Northouse*, 848 N.E.2d at 675.

to by the Court in *Fletcher*. Moreover, the Indiana Supreme Court directly compared Rule 24 enforcement actions to disciplinary actions in determining the appropriate standard of proof in a Rule 24 enforcement action. *Ind. State Bar Ass'n v. Diaz*, 838 N.E.2d 433, 438 (Ind. 2005). Thus, Rule 24 enforcement actions are not quasi-criminal and do not require the same procedural safeguards as a criminal action.

Petitioners base their vagueness challenge to Rule 24 on *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Gonzales v. Carhart*, 550 U.S. 124 (2007); and *Conally v. General Constr. Co.*, 269 U.S. 385 (1926). Each of these cases is inapplicable to the Enforcement Action because each addressed the due process considerations at issue in enacting, interpreting, and enforcing ***criminal*** statutes. Because Rule 24 is not a criminal provision, these cases are inapposite.

Petitioners also cite *Flipside*, 455 U.S. at 499-500, for the proposition that quasi-criminal statutes are subject to the same strict vagueness test as criminal statutes. (Petition 14). This assertion overstates the Court's conclusion in *Flipside* that the admittedly "'quasi-criminal' [statute] and its prohibitory and stigmatizing effect may warrant a relatively strict test."[3] *Flipside*, 455 U.S. at 499. In any event,

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[3] Similarly, Petitioners' reliance on *Sedima v. Imrex Co.*, 473 U.S. 479, 492-93 (1985), is misplaced. The Court's concern in that case was whether statutorily mandated civil penalties in a RICO action could be limited to instances in which the defendant had previously been found guilty in a criminal matter of a

(Continued on following page)

Rule 24, which is grounded in Indiana's Constitution, is not quasi-criminal, but quasi-disciplinary. *See* Ind. Const. Art. 7 § 4. Thus, Petitioners' argument that the prohibition on UPL in Indiana is unconstitutionally vague fails.

While courts have recognized a limited application of the vagueness doctrine to cases involving certain fundamental freedoms, Petitioners have not asserted, nor can they, that Rule 24 affects these rights. Petitioners seek review of Rule 24 under the standards set forth in *NAACP v. Button*, 371 U.S. 415 (1963), and *Trainmenr*, 377 U.S. 1. As asserted by Petitioners, both cases apply the vagueness doctrine to statutes governing the practice of law. However, *Button* analyzes a statute which limited First Amendment rights.

> The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, ***in the***

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related violation. *Sedima* at 491. The Court found, however, that criminal conviction was not necessary in order to impart civil penalties under a civil standard of proof. *Id.* at 491. Almost as an aside, and without determining whether the availability of treble damages as a civil remedy was quasi-criminal in nature, this Court reasoned that the due process concerns at issue could be repaired by raising the standard of proof in the civil actions rather than by requiring a previous criminal conviction in order to utilize the civil remedy. *Id.* at 492-93.

> ***area of First Amendment freedoms***, the existence of a penal statute susceptible of sweeping and improper application.[4]

Button, 317 U.S. at 432-33 (emphasis added). Similarly, *Trainmen* considers an injunction which limited First and Fourteenth Amendment rights. *Trainmen* at 1118. The scope of Rule 24 does not reach First or Fourteenth Amendment freedoms, and Petitioners present no argument that it does reach such freedoms.[5] Neither their life, liberty, or property is at risk here. Disgorging ill-gotten gains is not the taking of property. *See, e.g., Porter*, 328 U.S. at 402. Thus, because Rule 24 enforcement actions are neither criminal nor quasi-criminal, the vagueness doctrine does not apply.

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[4] Petitioners inexplicably exclude this critical reference to the First Amendment in their analysis of *Button*. (Petition 14).

[5] Petitioners portray their conduct as that of a simple lawyer-referral service, rather than owning up to the elaborate scheme involving a sales force of non-lawyers who give legal advice without attorney supervision. (Petition at 27). Such a characterization of the UFSC model invites a misapplication of many cases cited by Petitioners in their favor. Specifically, *United Transportation Union v. State Bar of Mich.*, 401 U.S. 576, 582-84 (1971); *Button*, 371 U.S. 415; *Trainmen*, 377 U.S. 1; and *United Mine Workers of America*, 389 U.S. 217, 221-22, each involve referral systems and First Amendment speech and assembly issues. None of these cases are analogous to the UFSC system of selling estate planning services without an initial legal analysis conducted by a licensed attorney.

2. Even if the vagueness doctrine were to apply to Rule 24, the rule is not vague on its face, or as applied to Petitioners' conduct.

Petitioners' attack on the alleged vagueness of Rule 24 fails. First, Rule 24 is not facially vague because, as outlined above, the Indiana Supreme Court has defined Rule 24 through decades of case law, and these definitions provide sufficient specificity as to the definition of the practice of law in Indiana. Second, Rule 24 is not vague as applied to Petitioners because their practices fell squarely within the Indiana Supreme Court's definition of the practice of law. Moreover, UFSC's recent admission that identical practices amounted to the UPL in Ohio, coupled with Petitioners' employee training regarding the practice of law, disclaimers regarding the practice of law, and legal advice warning them that their practices flirted with Rule 24 violations, defeat their claim that they could not discern what conduct was prohibited.

a. The Indiana Supreme Court has defined UPL so that Rule 24 is not unconstitutionally vague on its face.

A statute is unconstitutionally vague where its language does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, or stated otherwise, where its language is such that people of

common intelligence must necessarily guess at its meaning. *See Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589 (1967). However, a statute is not unconstitutionally vague when an ordinary person exercising ordinary common sense can sufficiently understand and comply with it. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Generally the decisions of this Court "upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 459 (1927) (citing *Nash v. United States*, 229 U.S. 373, 377 (1913)). Judicial interpretations of a statute can settle the meaning of terms employed therein. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010). *See also Bellows v. Merchants Despatch Transp. Co.*, 257 A.D. 15, 16 (N.Y. App. Div. 1939) (if the meaning of terms employed in the statute "have long been recognized in law and life", they will be considered sufficiently definite), *judgment aff'd*, 27 N.E.2d 440 (1940); *Associated Builders and Contractors, Saginaw Valley Area Chapter v. Director, Dept. of Consumer & Indust. Serv.*, 705 N.W.2d 509 (Mich. Ct. App. 2005) (a statute is sufficiently definite for purposes of due process if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries,

treatises, or the commonly accepted meanings of words).

In this regard, "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation '[this Court] must take the statute as though it read precisely as the highest court of the State has interpreted it.'" *Wainright v. Stone*, 414 U.S. 21, 22-23 (1973). "When a state statute 'has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light." *Id.* a 23.

As noted previously herein, *Northouse* is the most recent pronouncement of the parameters of the definition of the practice of law in Indiana, which has long been defined to include giving "legal advice and counsel". *Fink*, 17 N.E.2d at 96. *Northouse* specifically addressed a situation in which a non-lawyer met with clients and discussed the clients' current estate planning efforts, collected information, and discussed the idea of estate planning documents such as living trusts, wills, and powers of attorney with clients. 848 N.E.2d at 670. During this same visit, the non-lawyer collected payment from the clients for the estate planning documents he had recommended during their meeting. *Id.* The non-lawyer then modified forms that had been previously drafted by an attorney and met with the clients again to assist them in executing the legal documents. *Id.* at 671. The

Indiana Supreme Court cited prior Indiana case law in finding that the practices described in the *Northouse* opinion amounted to UPL. *Id.* at 672 (citing *Miller*, 463 N.E.2d at 251 (giving legal advice, managing the affairs of a client, and ministering to the legal affairs of another is the practice of law); *State ex rel. Pearson v. Gould*, 437 N.E.2d 41, 42 (Ind. 1982) (giving advice as to the contents and legal effect of a will is the practice of law)). The *Northouse* opinion recognized decisions from other jurisdictions in finding UPL where non-lawyers sold estate planning services. *Id.* (citing among others, *Cleveland Bar,* 837 N.E.2d at 1186). *See also Hackin v. Arizona*, 389 U.S. 143 (1967) (appeal dismissed for "want of a federal question" on a claim that Arizona UPL statute was "too vague and indefinite" to meet Constitutional standards).

b. In addition to the plethora of case law defining UPL in Indiana, Petitioners knew that their conduct was prohibited because they obtained legal advice as to legality of their practices and admitted that identical conduct constituted UPL in Ohio.

Petitioners' dismay and surprise that their actions in Indiana amounted to UPL is not credible because UFSC admitted in Ohio that the identical business scheme was UPL. The model is recited at *Ohio Bar v. UFSC*, 921 N.E.2d at 1054-55. (*Cf.* App.

30, ¶ 2-36, ¶ 16). The Supreme Court of Ohio accepted and approved the proposed consent decree submitted by UFSC and the Ohio State Bar Association setting forth the essential elements of UFSC's estate planning practices, which closely mirror the practices recited in the Commissioner's Findings of Fact and the Disgorgement Order.[6] Given UFSC's admission that virtually the same conduct at issue here was UPL in Ohio, Petitioners' claim that they could not have known their conduct in Indiana was UPL is dubious at best.

Moreover, Petitioners solicited (and ignored) legal advice from Attorney Bruce Kotzan, who advised in 1999:

> It is my opinion that you can employ attorneys to represent individuals in the course of your marketing of estate planning products, but the lawyer's representation of the clients must truly be independent. The attorney must represent the client and not the company. There must be contact between the client and the attorney. In the event employees

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[6] The Ohio rules prohibiting UPL, like Indiana's are judicially defined. While Ohio's Gov. Bar R. VII(2)(A) defines the UPL as "the rendering of legal services for another person by any person not admitted to practice in Ohio," the Supreme Court of Ohio turns to its own precedent to further specify that definition. *See, e.g.*, *Cincinnati Bar Ass'n v. Kathman*, 748 N.E.2d 1091, 1095 (Ohio 2001) (citing *Trumbull Cty. Bar Ass'n v. Hanna*, 684 N.E.2d 329, 331 (Ohio 1997) for the proposition that non-attorneys engage in UPL when they market and sell living trusts).

> of the company engage in the gathering of information for the preparation of documents, these employees must be acting under the direction of the attorney.

(App. 36, ¶ 17). The Indiana Supreme Court agreed that "UFSC's business model has marginalized the attorney's role to such a degree as to cross the line of permissible practices." (App. 13-14).

In advising UFSC about its business model and practices, UFSC's inside and outside counsel could have easily found Indiana case law such as *State ex rel. Pearson v. Gould*, 437 N.E.2d 41, 42 (Ind. 1982), which held that preparing and drafting a will, and giving legal advice about the contents and effect of a will, constitute the practice of law. Petitioners similarly could have reviewed *Northouse*, which held that "giving advice as to the contents and legal effect of a will constitute the practice of law." 848 N.E.2d at 672. Indeed, because of the similarity of the facts in *Northouse* to Petitioners' business scheme, the Indiana Supreme Court noted that *Northouse* "should have put UFSC on clear notice that its practices were unlawful. Regardless of whether UFSC acted properly prior to *Northouse* to ascertain whether its practices were lawful, the illegality of UFSC's business model certainly should have been apparent after *Northouse*." (App. 22-23).

Apparently in anticipation of litigation, UFSC hired Professor William Hodes. (App. 52). Hodes testified at length that Petitioners' business model

and practices did not violate Rule 24. (App. 52, ¶¶ 26, 28). The Commissioner then admitted rebuttal testimony by Sarah McShea, who testified that Petitioners' practices amounted to UPL. (App. 52, ¶ 26). Petitioners' argument that the testimony of Ms. McShea proves the confusing nature of Indiana's UPL restriction is a *non sequitur*, as borne out by UFSC's admission in Ohio that it knew its business practices amounted to UPL. *Ohio Bar v. UFSC*, 921 N.E.2d at 1054-55.

In addition to the fact that UFSC admitted its practices violated the prohibition on UPL in Ohio, UFSC devoted substantial resources to training its employees as to the boundaries of the practice of law and included disclaimers in its consumer materials, purportedly to alert customers that its representatives were not engaging in the practice of law. (App. 70, ¶ 62; 78, ¶ 88). If the definition of the practice of law in Indiana is truly so mystifying that Petitioners could not discern the line dividing permissible and prohibited conduct, it is incredible that they would tread so close to the line and train employees as to where that boundary lies. *See Nash v. United States*, 229 U.S. 373, 377 (1913) ("the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree").

Petitioners' argument that not even the facts of *Northouse* put them on notice that their practices were illegal essentially advocates for a legal standard requiring an Indiana case presenting the exact same facts at issue for a Rule 24 violator to have received

sufficient notice that its actions may lead to disgorgement of fees. (Petition at 21). *Northouse* already presented the similar situation of a non-attorney providing legal advice and selling legal documents, including wills and trusts, to individuals. (App. 13). The Ohio cases from 1997, 2001, and 2005 also presented similar sales of estate plan packages as those sold by Petitioners. The due process requirements applicable to a state's governance of the practice of law within its boundaries do not require further specificity of the offense in this context. *Flipside*, 455 U.S. at 498 ("The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment."). Petitioners had fair notice and received all the process that was due. Rule 24, and the definition of the practice of law in Indiana are sufficiently specific that Petitioner's request for certiorari should be denied.

II. The Indiana Supreme Court Found Petitioners' Accusations of Prosecutorial Misconduct by the ISBA to be Without Merit.

The ISBA's settlement demand did not violate the Petitioners' due process rights. Though not mentioned in the Petition, Petitioners' argument of prosecutorial misconduct has already been deemed "baseless" and "without merit" by the Indiana Supreme Court. While Petitioners contend that the ISBA's settlement proposal evidences prosecutorial bias, the Indiana Supreme Court specifically found that the effort was not

"indicative of any improper self-interest by the ISBA in bringing unauthorized practice action under Rule 24." (App. 17). In an attempt to resolve some of the issues in the case, and in response to an "invitation extended" by counsel for Petitioners, the ISBA proposed various settlement concepts which would ultimately be presented to the Indiana Supreme Court for approval if they evolved into an agreement between the parties. The Petitioners rejected this effort. Settlement Letter at 1.

The ISBA had no authority to independently resolve the Enforcement Action. The Indiana Supreme Court's Order of January 30, 2009, encouraged settlement and specifically required the Court's approval of any settlement. January 30, 2009 Order, ¶ 7. In essence, the settlement process was akin to a consent judgment – the parties were to present an agreement as to the violation and appropriate sanction to the Indiana Supreme Court, which retained the ultimate discretion to accept or reject that agreement. The notion that the ISBA was improperly attempting to use Rule 24 for financial benefit is directly at odds with the reality that the Indiana Supreme Court approved all settlements. Moreover, this assertion was flatly rejected by the Commissioner and the Indiana Supreme Court. (App. 16-18; 61-63, ¶¶ 41-47). There was no basis for Petitioners' claim that this action was predicated on such an attempt. (App. 16-18; 61-63, ¶¶ 41-47).

The parties' settlement discussions did not reach the merits of the charged Rule 24 violations. Although the ISBA has the authority to bring a Rule 24 enforcement action, the Indiana Supreme Court is the entity that ultimately decides whether Rule 24 was violated and the appropriate remedy. The ISBA was not in a position to drop all the claims, it was merely able to stipulate certain facts and issues, in a joint effort to streamline litigation and curtail the expenditures of time and resources by the Indiana Supreme Court, the Commissioner, and the parties. The settlement discussions at no point contemplated that the alleged rule violations would be reduced. Indeed, there is no concept such as a "lesser included charge" for which Petitioners could have bargained. A respondent to a Rule 24 enforcement action has either violated Rule 24 or has not; there is no middle ground.

The primary case Petitioners rely on in support of their position, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), concludes that the strict requirements against the impermissible risk of bias "designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." *Id.* at 248. The requirements against bias have been extended to prosecutors and those in quasi-prosecutorial roles in instances where the decision whether to initiate or reduce criminal charges can result in some pecuniary gain to the prosecutor. *See, e.g., Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 805

(1987). As explained in *Young*, a prosecutor representing the interests of a private party in a related civil action "may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges." *Id.*

The ISBA's role in a Rule 24 enforcement action is not subject to these concerns because the ISBA could not have unilaterally settled this Enforcement Action. The ISBA had not previously engaged in settlement negotiations presenting an opportunity for financial gain via a Rule 24 enforcement action. (App. 16-18; 61-63, ¶¶ 41-47). The appearance of impropriety warned against in *Young* does not exist because the Indiana Supreme Court ordered that it must approve all settlement agreements. This arrangement guards against even the appearance of impropriety. *Young*, 481 U.S. at 811.

This case does not present a situation akin to *Young*, in which an individual prosecuting an action could realize a private benefit from the result. Rather, as in *Marshall*, "no governmental [or other] official stands to profit economically from vigorous enforcement" of Rule 24. 446 U.S. at 239. In *Marshall*, this Court upheld the propriety of a statutory provision requiring civil penalties be returned to the governmental agency charged with investigating and enforcing child labor violations as reimbursement for the

expenses incurred in the enforcement process. *Id.* at 247. As explained in *Tumey v. Ohio* "the legislature of a State may, and often *ought to*, stimulate prosecutions for crime by offering to those who shall initiate and carry such prosecutions rewards for thus acting in the interest of the State and the people." *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (emphasis added). As in *Marshall*, the ISBA does not ultimately assess a Rule 24 violation or determine the appropriate sanction; the Indiana Supreme Court reserves this function to itself. *See Marshall* 446 U.S. at 247 ("The function of assessing a violation is akin to that of a prosecutor or civil plaintiff", and the alleged violator is entitled to a hearing before a judge).

The ISBA is merely the relator of the State's interest in protecting Indiana citizens from the harmful effects of UPL. To the extent that the ISBA's role in the Rule 24 proceedings can be deemed analogous to that of a criminal prosecutor, Petitioners failed to develop any facts or law demonstrating that the ISBA was unfairly interested in the outcome of this action. The ISBA had no expectation that initiating the Enforcement Action would result in financial gain and there was no evidence of prosecutorial bias.

III. The Indiana Supreme Court Correctly Held the Individual Petitioners Jointly and Severally Liable for the Disgorgement of Fees and Payment of Costs.

Petitioners incorrectly argue that the Indiana Supreme Court did not enter any findings to support the imposition of joint and several liability for the disgorgement of fees and costs over the individual Petitioners. (Petition, 35). Both the Commissioner's Findings of Fact and the Indiana Supreme Court's opinion offer generous factual support for finding the individual Petitioners just as liable as UFSC for engaging in the UPL. Indeed, contrary to the Petitioners' argument, this is not a case of "guilt by association"[7] – rather, the individual Petitioners here *are* the "association." (Petition, 38).

In a practical sense, UFSC cannot sit for the bar exam, and thus, technically cannot practice law. *See Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 158 (Ind. 1999) (noting that "only a natural person can be

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[7] The cases cited by Petitioners in support of this argument, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and *Rizzo v. Goode*, 423 U.S. 632 (1976), are inapposite. The *Claiborne* case dealt with the exercise of First Amendment freedoms in connection with legitimate activities. Here, there are no First Amendment concerns and the activity at issue is not lawful. Similarly, the *Rizzo* case involved the issuance of an injunction against persons who had no connection with the activity being enjoined. Here, the individual Petitioners are not innocent bystanders – they were the individuals at UFSC that orchestrated, participated in, and profited from, the unlawful activity.

admitted to the bar"). However, the Indiana Supreme Court has noted that, in the context of the practice of law, "agency doctrine permits an unlicensed legal entity to employ licensed agents to perform those acts requiring a license." *Id.* at 160 (internal citation omitted). In other words, to the extent a corporation is said to practice law, it does so through its agents. On this point, the Court stated:

> Regardless of whether a partnership, a professional corporation, an insurance company, or any other legal entity may be said to be practicing law in some sense, **we believe the proper focus of the unauthorized practice inquiry is whether the challenged activity results in the "unauthorized" practice by the *individuals* involved**.

Id. (emphasis added). Ignoring this precedent, the individual Petitioners engage in misdirection by attempting to now distance themselves from the UFSC entity – the very entity they owned, managed, worked for, and/or profited from. Consistent with the standard set forth in *Wills*, the examination of UFSC's business model and practices in the underlying Enforcement Action necessarily centered around the activities being performed by the individual Petitioners who acted on behalf of UFSC.

During the course of the proceedings, including the 3-day evidentiary hearing, the ISBA proved that UFSC's business model and practices constituted UPL. For instance, it was established that non-lawyer

salespeople without attorney supervision engaged in UPL by, among other things, marketing and selling estate plans, providing legal advice, and explaining the relevance and purpose of legal documents to customers. (App. 29-38, ¶¶ 1-23). It logically follows that Petitioners Jody Waugh, Raymond Phillips and James Boyles, who worked as non-lawyer salespeople for UFSC, engaged in acts constituting UPL in their respective capacities.[8]

Moreover, several of the individual Petitioners owned and/or managed the UFSC enterprise and facilitated UPL. Since the company's inception in 1995 to late 2008, Petitioners Richard Follett and Jayne Follett were principals of UFSC, whose sole shareholder was the Jayne A. Follett Family Limited Partnership ("Follett Family L.P."). (App. 71, ¶ 63). Then, after a curious corporate restructuring of UFSC during the pendency of the Enforcement Action, UFSC became owned by United Financial Resources, which in turn, was held by the Follett Family L.P. (App. 71, ¶ 64). The members of the Follett Family L.P. include Petitioners Dick Follett, Jane Follett, Richard L. Follett II, Beau Follett, and James Boyles. (App. 71, ¶ 64). These individuals (who have an ownership interest in UFSC), in addition to Petitioners Raymond C. Phillips, Gary Lovelady, Sharon Dorsey, and Sherry Jordan, formed UFSC's home

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[8] Each of these Petitioners was specifically implicated in UPL activities concerning certain UFSC customers that were named in the ISBA's Petition. (App. 98-138, ¶¶ 134-248).

office senior management during the relevant time period – a fact stipulated by the parties. (App. 72, ¶ 65). John Joyce was subsequently hired as a Panel Attorney for UFSC in February 2000.[9] (App. 74, ¶ 79).

Referring to non-lawyer salespeople and Panel Attorneys, the Indiana Supreme Court noted that "all of these persons are essential to UFSC's core business model." (App. 7). In like fashion, each of the individual Petitioners also played a role in the UFSC business model, whether in training, managing and/or aiding non-lawyer salespeople, or in marketing and selling estate plans to customers while dispensing legal advice in the process. Ultimately, all of the Petitioners share at least one thing in common – they each personally profited from the unlawful activities of the UFSC enterprise, whether in the form of a dividend, distribution, salary, or commission. As the Disgorgement Order recognizes, the individual Petitioners should not be allowed to profit from these illicit gains.

Notwithstanding Petitioners' argument to the contrary, the State is not required to pierce the corporate veil in order to impose liability on an individual that engages in UPL on behalf of a corporation. Petitioners cite to no authority for this proposition. Individuals, just like the entities they work for, are

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[9] On April 17, 2009, the ISBA moved to amend its Petition to include claims against the named Panel Attorneys, including John Joyce, for aiding or assisting non-lawyers in the UPL. The Commissioner granted the ISBA's motion on May 18, 2000.

equally subject to the restrictions Rule 24 imposes and cannot shield themselves from liability by simply hiding behind a corporate structure. Indeed, in the context of a UPL action, it is not unique to hold individual violators liable despite the fact they were acting on behalf of a corporation. *See, e.g., Cleveland Bar*, 837 N.E.2d at 1187-88 (imposing joint and several liability on the individual respondents of a trust mill in a UPL action). Like the individual respondents' relationship with the entity in *Cleveland Bar*, the individual Petitioners here were under contract with UFSC, were agents of UFSC, and "received extensive training from [UFSC] on marketing and selling trust and estate plans to customers." *Id.* at 1187.

In imposing joint and several liability, the Ohio Supreme Court in *Cleveland Bar* noted, *inter alia*, that the respondents' violations "were flagrant because they aggressively targeted customers even after [a prior 2001 Ohio decision], which warned that trust-mill operations are UPL violations." *Id.* at 1188. The Court also held that the individual respondents had "willfully defrauded their customers by selling trusts and estate documents without authorization." *Id.* The instant case is analogous in virtually every way. The individual Petitioners were agents of UFSC, they continued to aggressively target customers despite the decision in *Northouse* in 2006. As in *Cleveland Bar*, joint and several liability is warranted here.

Finally, the notion that the individual Petitioners were not afforded "even the basic procedural safeguards" and were given "*little if any opportunity to* conduct discovery" (Petition, 39) is unsupported by the record. First, counsel for Petitioners admitted during oral argument before the Indiana Supreme Court that formal discovery in this matter was not necessary and that the parties fully cooperated in informal discovery efforts. Oral Argument at 45:19. Further, these individuals were named respondents in the ISBA's Petition since its inception and were represented by the same counsel that defended UFSC. Through their counsel, they participated in the proceedings, engaged in discovery, and had an opportunity to present their defense at the 3-day evidentiary hearing.[10] Prior to the hearing, they filed seven (7) pre-trial motions, including a motion to dismiss the Enforcement Action, which was denied. (App. 57, ¶ 40).

After conducting the evidentiary hearing including three days of testimony and hundreds of UFSC's internal documents, the Commissioner correctly entered findings detrimental to the Petitioners. The Indiana Supreme Court reviewed the record and held that Petitioners engaged in UPL. The individual

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[10] Despite being individually named as respondents in the enforcement action, Petitioners Jayne A. Follett, Sharon Dorsey, Sherry Jordan, and Gary Lovelady did not personally appear for the evidentiary hearing. (App. 56, ¶ 37).

Petitioners received appropriate due process, procedural and substantive, and cannot now argue otherwise.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that Petitioners' request for certiorari be denied.

Respectfully submitted,

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